

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Dec 10, 2018

SEAN F. McAVOY, CLERK

TIMOTHY G.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL

SECURITY ADMINISTRATION,

Defendant.

No. 2:18-cv-00050-SAB

**ORDER DENYING  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT;  
GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT**

Before the Court are Plaintiff's Motion for Summary Judgment, ECF No. 14, and Defendant's Cross-Motion for Summary Judgment, ECF No. 16. The motions were heard without oral argument. Plaintiff is represented by Christopher H. Dellert, and Defendant is represented by Assistant United States Attorney Timothy Durkin and Special Assistant United States Attorney Justin Martin.

For the reasons set forth below, the Court **denies** Plaintiff's motion, **grants** Defendant's motion, and **affirms** the administrative law judge ("ALJ") decision denying disability benefits.

**Jurisdiction**

On May 27, 2014, Plaintiff filed a Title II application for disability insurance benefits. Plaintiff alleges an onset date of June 26, 2013.

Plaintiff's application was denied initially and on reconsideration. On June 2, 2016, Plaintiff appeared and testified at a hearing held in Seattle, Washington before an ALJ. Leta R. Berkshire also participated as a vocational expert. Plaintiff was represented by John Paul Gustad and Maren Miller Bam, attorneys.

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1 The ALJ issued a decision on August 24, 2016, finding that Plaintiff was not  
2 disabled. Plaintiff timely requested review by the Appeals Council, which denied  
3 the request on December 15, 2017. The Appeals Council's denial of review makes  
4 the ALJ's decision the final decision of the Commissioner.

5 Plaintiff filed a timely appeal with the United States District Court for the  
6 Eastern District of Washington on February 20, 2018. The matter is before this  
7 Court under 42 U.S.C. § 405(g).

### 8 Sequential Evaluation Process

9 The Social Security Act defines disability as the "inability to engage in any  
10 substantial gainful activity by reason of any medically determinable physical or  
11 mental impairment which can be expected to result in death or which has lasted or  
12 can be expected to last for a continuous period of not less than twelve months." 42  
13 U.S.C. § 1382c(a)(3)(A). A claimant shall be determined to be under a disability  
14 only if his impairments are of such severity that the claimant is not only unable to  
15 do his previous work, but cannot, considering claimant's age, education, and work  
16 experiences, engage in any other substantial gainful work which exists in the  
17 national economy. 42 U.S.C. § 1382c(a)(3)(B).

18 The Commissioner has established a five-step sequential evaluation process  
19 for determining whether a person is disabled. 20 C.F.R. § 416.920(a)(4); *Bowen v.*  
20 *Yuckert*, 482 U.S. 137, 140-42 (1987).

21 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R.  
22 § 404.1520(b). Substantial gainful activity is work done for pay and requires  
23 compensation above the statutory minimum. *Id.*; *Keyes v. Sullivan*, 894 F.2d 1053,  
24 1057 (9th Cir. 1990). If the claimant is engaged in substantial activity, benefits are  
25 denied. 20 C.F.R. § 404.1520(b). If he is not, the ALJ proceeds to step two.

26 Step 2: Does the claimant have a medically-severe impairment or  
27 combination of impairments? 20 C.F.R. § 404.1520(c). If the claimant does not  
28 have a severe impairment or combination of impairments, the disability claim is

1 denied. A severe impairment is one that lasted or must be expected to last for at  
2 least 12 months and must be proven through objective medical evidence. 20 C.F.R.  
3 § 404.1509. If the impairment is severe, the evaluation proceeds to the third step.

4 Step 3: Does the claimant's impairment meet or equal one of the listed  
5 impairments acknowledged by the Commissioner to be so severe as to preclude  
6 substantial gainful activity? 20 C.F.R. § 404.1520(d); 20 C.F.R. § 404 Subpt. P.  
7 App. 1. If the impairment meets or equals one of the listed impairments, the  
8 claimant is conclusively presumed to be disabled. *Id.* If the impairment is not one  
9 conclusively presumed to be disabling, the evaluation proceeds to the fourth step.

10 Before considering Step 4, the ALJ must first determine the claimant's  
11 residual functional capacity. 20 C.F.R. § 404.1520(e). An individual's residual  
12 functional capacity is his ability to do physical and mental work activities on a  
13 sustained basis despite limitations from his impairments.

14 Step 4: Does the impairment prevent the claimant from performing work he  
15 has performed in the past? 20 C.F.R. § 404.1520(f). If the claimant is able to  
16 perform his previous work, he is not disabled. *Id.* If the claimant cannot perform  
17 this work, the evaluation proceeds to the fifth and final step.

18 Step 5: Is the claimant able to perform other work in the national economy in  
19 view of his age, education, and work experience? 20 C.F.R. § 404.1520(g).

20 The initial burden of proof rests upon the claimant to establish a prima facie  
21 case of entitlement to disability benefits. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th  
22 Cir. 1999). This burden is met once a claimant establishes that a physical or mental  
23 impairment prevents him from engaging in his previous occupation. *Id.* At step five,  
24 the burden shifts to the Commissioner to show that the claimant can perform other  
25 substantial gainful activity. *Id.*

## 26 Standard of Review

27 The Commissioner's determination will be set aside only when the ALJ's  
28 findings are based on legal error or are not supported by substantial evidence in the

1 record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992) (citing  
2 42 U.S.C. § 405(g)). Substantial evidence is “more than a mere scintilla,”  
3 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but “less than a preponderance.”  
4 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). Substantial  
5 evidence is “such relevant evidence as a reasonable mind might accept as adequate  
6 to support a conclusion.” *Richardson*, 402 U.S. at 401. The Court must uphold the  
7 ALJ’s denial of benefits if the evidence is susceptible to more than one rational  
8 interpretation, one of which supports the decision of the administrative law judge.  
9 *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9th Cir. 2004). The Court reviews the  
10 entire record. *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). “If the evidence  
11 can support either outcome, the court may not substitute its judgment for that of the  
12 ALJ.” *Matney*, 981 F.2d at 1019.

13 A decision supported by substantial evidence will be set aside if the proper  
14 legal standards were not applied in weighing the evidence and making the decision.  
15 *Brawner v. Secr’y of Health & Human Servs.*, 839 F.2d 432, 433 (9th Cir. 1988).  
16 An ALJ is allowed “inconsequential” errors as long as they are immaterial to the  
17 ultimate nondisability determination. *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d  
18 1050, 1055 (9th Cir. 2006).

### 19 **Statement of Facts**

20 The facts have been presented in the administrative transcript, the ALJ’s  
21 decision, and the briefs to this Court; only the most relevant facts are summarized  
22 here. At the time of the hearing, Plaintiff was 51 years old. He has a long work  
23 history. He worked as a case manager for the Washington State Court of Appeals  
24 from 1996 to 2013, after which he unsuccessfully attempted to work at two less  
25 stressful jobs at a doggie day care and a drug rehab facility. Plaintiff has a long and  
26 extensive history of substance abuse, including alcohol, cocaine, prescription drugs,  
27 and marijuana, beginning from age 20.

28 Plaintiff testified he is unable to work because of extreme anxiety. He

1 indicated that it is very difficult for him to leave his house. In fact, he rarely leaves  
2 the house during the day, doing his grocery shopping in the early morning hours.  
3 He reported instances at his prior jobs where he would be criticized, he would feel  
4 threatened, and then he would have angry outbursts.

5 When questioned, he indicated he believed he could work if he had a job  
6 where he had a supervisor, but was primarily alone and did not have to work in a  
7 team setting.

8 Plaintiff entered treatment for alcohol abuse in July, 2013. Prior to that he  
9 quit using cocaine on his own. Although he had a couple of relapses, for the most  
10 part he has remained clean and sober. He also reported losing a significant amount  
11 of weight, which alleviated problems he was having with sleep apnea and diabetes.

### 12 **The ALJ's Findings**

13 At step one, the ALJ found Plaintiff has not engaged in substantial gainful  
14 activity since June 26, 2013. AR 23.

15 At step two, the ALJ found Plaintiff has the following severe impairments:  
16 bipolar disorder, anxiety disorder (Posttraumatic stress disorder), and alcohol  
17 dependence, in remission. AR 23.

18 At step three, the ALJ found that Plaintiff's impairments or combination of  
19 impairments do not meet or medically equal any Listing. Specifically, the ALJ  
20 reviewed listings 12.04, 12.06 and 12.09. AR. 24.

21 The ALJ concluded that Plaintiff has the residual functional capacity to  
22 perform

23 A full range of work at all exertional levels but with the following  
24 nonexertional limitations: he can understand, remember, carry out  
25 simple as well as routine and repetitive tasks. He should not work with  
26 the general public. He can have occasional brief superficial contact  
27 with coworkers, but should work independently, not on team or  
28 tandem tasks. He can have occasional contact with supervisors. He  
needs a routine and predictable work environment with few changes  
in those routines.

1 AR. 25. At step four, the ALJ found that Plaintiff is unable to perform any past  
2 relevant work. AR 31.

3 At step five, the ALJ found Plaintiff was not disabled on the basis that he  
4 could perform other work which exists in significant numbers in the national  
5 economy, including positions such as janitor, agricultural sorter, industrial cleaner,  
6 and electrical accessories assembler. AR 32.

### 7 **Issues for Review**

- 8 1. Whether the ALJ provided sufficient reasons to reject the medical opinions  
9 of Dr. Oreskovich and Dr. Moore, and to reject Mr. Mosshart's therapist's  
10 opinion; and  
11 2. Whether the ALJ properly assessed Plaintiff's subjective claims.

### 12 **Discussion**

- 13 1. *Whether the ALJ properly evaluated the medical opinion evidence*

14 Plaintiff asserts the ALJ erred in its evaluation of the medical opinions of  
15 Dr. Oreskovich and Dr. Moore, as well as Mr. Mosshart's opinion.

16 There are three types of physicians: "(1) those who treat the claimant  
17 (treating physicians); (2) those who examine but do not treat the claimant  
18 (examining physicians); and (3) those who neither examine nor treat the claimant  
19 [but who review the claimant's file] (nonexamining [or reviewing] physicians)." *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001). Generally, a  
20 treating physician's opinion carries more weight than an examining physician's  
21 opinion, and an examining physician's opinion carries more weight than a  
22 reviewing physician's opinion. *Id.* at 1202. "In addition, the regulations give more  
23 weight to opinions that are explained than to those that are not, and to the opinions  
24 of specialists concerning matters relating to their specialty over that of  
25 nonspecialists." *Id.* (citations omitted).

26  
27 "If a treating physician's opinion is well-supported by medically acceptable  
28 clinical and laboratory diagnostic techniques and is not inconsistent with the other

1 substantial evidence in the case record, it will be given controlling weight.” *Orn v.*  
2 *Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). If a treating physician’s opinion is not  
3 given “controlling weight,” the ALJ should consider the length of the treatment  
4 relationship and the frequency of examination by the treating physician; the nature  
5 and extent of the treatment relationship between the patient and the treating  
6 physician; supportability; consistency with the record, and specialization of the  
7 physician. 20 C.F.R. § 404.1527(c)(2)-(6); *Orn*, 495 F.3d at 631.

8       If a treating or examining physician’s opinion is uncontradicted, the ALJ  
9 may reject it only by offering “clear and convincing reasons that are supported by  
10 supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th  
11 Cir. 2005). The ALJ need not accept the opinion of any physician, including  
12 treating physicians, if that opinion is brief, conclusory and inadequately supported  
13 by clinical findings. *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th  
14 Cir. 2009). “If a treating or examining physician’s opinion is contradicted by  
15 another doctor’s opinion, an ALJ may only reject it by providing specific and  
16 legitimate reasons that are supported by substantial evidence.” *Bayliss*, 427 F.3d at  
17 1216. This is so because, even when contradicted, a treating or examining  
18 physician's opinion is still owed deference and will often be “entitled to the  
19 greatest weight ... even if it does not meet the test for controlling weight.” *Orn*, 495  
20 F.3d at 633. An ALJ may reject a treating physician's opinion if it is based “to a  
21 large extent” on a claimant's self-reports that have been properly discounted as  
22 incredible. *Morgan v. Comm'r Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999).  
23 It may reject a treating physician’s opinion if it is inconsistent with the medical  
24 records. *Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008).

25       “[A]n ALJ errs when he rejects a medical opinion or assigns it little weight  
26 while doing nothing more than ignoring it, asserting without explanation that  
27 another medical opinion is more persuasive, or criticizing it with boilerplate  
28 language that fails to offer a substantive basis for his conclusion.” *Garrison v.*

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1 *Colvin*, 759 F.3d 995, 1012–13 (9th Cir. 2014) (citing *Nguyen v. Chater*, 100 F.3d  
2 1462, 1464 (9th Cir. 1996)).

3 1. *Dr. Oreskovich*

4 Dr. Oreskovich is a treating physician who opined that Plaintiff was  
5 extremely limited in his ability to understand, remember, and carry out detailed  
6 instructions, markedly limited in his ability to interact appropriately with the public  
7 and with supervisors, and extremely limited in his ability to respond appropriately  
8 to work pressures in the usual work setting.

9 The ALJ assigned little weight to Dr Oreskovich’s opinion. Because Dr.  
10 Oreskovich’s opinion was contradicted by Dr. Brown and Dr. Regets, the two State  
11 agency reviewing physicians, the ALJ was required to provide specific and  
12 legitimate reasons for rejecting Dr. Oreskovich’s opinion. *See Bayliss*, 427 F.3d at  
13 1216. The ALJ indicated that Dr Oreskovich’s opinion was inconsistent with his  
14 treatment notes, where treatment notes showed stable mood, organized logical,  
15 though process as well as intact memory and concentration and inconsistent with  
16 the longitudinal record evidence.

17 In doing so, the ALJ provided specific, legitimate reasons that are supported  
18 by substantial evidence for rejecting Dr. Oreskovich’s opinion. *See Valentine v.*  
19 *Comm’r Soc. Sec. Admin.*, 574 F.3d 685, 692-93 (9th Cir. 2009) (upholding ALJ’s  
20 rejection of treating physician’s contradicted opinion because it conflicted with his  
21 own treatment notes). The ALJ’s interpretation that the treatment notes did not  
22 support the marked and extreme limitations was reasonable. While Dr. Oreskovich  
23 also provided negative examination findings, this Court is not permitted to second-  
24 guess the ALJ’s conclusions when the record is susceptible to more than one  
25 rational interpretation. *See Batson*, 359 F3d at 1193.

26 2. *Dr. Moore*

27 Dr. Moore performed a psychological evaluation in September, 2014.  
28 Because Dr. Moore’s opinion was contradicted by Dr. Brown and Dr. Regets, the



1 two State agency reviewing physicians, the ALJ was required to provide specific  
2 and legitimate reasons for rejecting Dr. Moore's opinion. *See Bayliss*, 427 F.3d at  
3 1216. The ALJ gave weight to some of the functional limitations Dr. Moore  
4 assessed by including the restrictions in the RFC, but discounted some of Dr.  
5 Moore's opinion. Specifically, the ALJ rejected his opinion that Plaintiff's  
6 emotional distress was "likely to interfere with his ability to concentrate and persist  
7 at tasks over a normal period of time," for three reasons: (1) this opinion was  
8 inconsistent with the treatment notes from Plaintiff's therapist, Mr. Mosshart; (2)  
9 this opinion was contradicted by the longitudinal record of improvement with  
10 treatment and control of Plaintiff's symptoms with medication; and (3) Plaintiff's  
11 work at the recovery center, which he testified he left due to physical problems, not  
12 due to emotional limitations. Finally, the ALJ noted that Dr. Moore's opinion was  
13 during a time where Plaintiff received bad news regarding his dog, which was a  
14 situational stress, rather than being indicative of not sustaining employment.

15 The ALJ provided specific, legitimate reasons that are supported by  
16 substantial evidence for discounting Dr. Moore's opinion.

17 3. *Mr. Mosshart*

18 The ALJ gave little weight to Mr. Mosshart's opinion, concluding it was  
19 inconsistent with his treatment notes, which indicate that Plaintiff showed stable  
20 mood and decreased anxiety. Mr. Mosshart frequently noted that Plaintiff was  
21 stable, less anxious, and making progress. The ALJ properly evaluated Mr.  
22 Mosshart's opinion. *See Turner v. Comm'r of Soc. Sec.*, 613 F.3d 1217, 1224 (9th  
23 Cir. 2010) (quotation omitted) (noting the ALJ may discount testimony from these  
24 "other sources" if the ALJ "gives reasons germane to each witness for doing so.")).  
25 While Mr. Mosshart may have noted other negative findings, this Court is not  
26 permitted to second-guess the ALJ's conclusions when the record is susceptible to  
27 more than one rational interpretation. *See Batson*, 359 F3d at 1193.

28 //

2. Whether the ALJ properly assessed Plaintiff's subjective symptom claims.

Plaintiff argues the ALJ failed to provide specific, clear and convincing reasons for rejecting his symptom testimony. The ALJ concluded that while Plaintiff had some limitations due to anxiety and issues with mood, these limitations do not preclude all work activity.

An ALJ engages in a two-step analysis to determine whether to discount a claimant's testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at \*2.<sup>1</sup> "First, the ALJ must determine whether there is objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged." *Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) (quotations marks omitted). "The claimant is not required to show that her impairment could reasonably be expected to cause the severity of the symptom she has alleged; she need only show that it could reasonably have caused some degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

Second, "[i]f the claimant meets the first test and there is no evidence of malingering, the ALJ can only reject the claimant's testimony about the severity of the symptoms if [the ALJ] gives 'specific, clear, and convincing reasons' for the rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations omitted). General findings are insufficient; rather, the ALJ must identify what symptom claims are being discounted and what evidence undermines these claims. *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995)); *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently

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<sup>1</sup> At the time of the ALJ's decision in August, 2016, the regulation that governed the evaluation of symptom claim was SSR 16-3p, which superseded SSR96-7p effective March 24, 2016. SSR 16-3p; Titles II and XVI: Evaluation of Symptoms in Disability Claims, 81 Fed. Reg. 15776 15776 (Mar. 24, 2016).

1 explain why it discounted claimant's symptom claims). "The clear and convincing  
2 [evidence] standard is the most demanding required in Social Security cases.  
3 *Garrison*, 759 F.3d at 1015 (quoting *Moore v. Comm'r of Soc. Sec. Admin.*, 278  
4 F.3d 920, 924 (9th Cir. 2002)).

5 Factors to be considered in evaluation the intensity, persistence, and limiting  
6 effects of a claimant's symptoms include: 1) daily activities; 2) the location,  
7 duration, frequency, and intensity of pain or other symptoms; 3) factors that  
8 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and  
9 side effects of any medication an individual takes or has taken to alleviate pain or  
10 other symptoms; 5) treatment, other than medication, an individual receives or has  
11 received for relief of pain or other symptoms; 6) any measures other than treatment  
12 an individual uses or has used to relieve pain or other symptoms (e.g., lying flat on  
13 his or her back, standing for 15 to 20 minutes every hour, or sleeping on a board);  
14 and 7) any other factors concerning an individual's functional limitations and  
15 restrictions due to pain or other symptoms. SSR16-3p, 2016 WL 1119029, at \*7;  
16 20 C.F.R. §§ 404.1529(c)(3); 416.929(c)(3).

17 Daily activities may be grounds for an adverse credibility finding if (1)  
18 Plaintiff's activities contradict his other testimony, or (2) Plaintiff "is able to spend  
19 a substantial part of his day engaged in pursuits involving the performance of  
20 physical functions that are transferable to a work setting." *Orn*, 495 F.3d at 639  
21 (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989))

22 The ALJ discounted Plaintiff's symptom testimony, finding that Plaintiff's  
23 subjective complaints were inconsistent with his improvement with treatment,  
24 daily activities and the treatment records. The ALJ noted that while Plaintiff  
25 indicated he has no friends, he also reported he made friends in treatment and did  
26 not want to leave them behind. He also indicated he used the computer for social  
27 networking and he went to the Grand Canyon for a three-week rafting trip. Plaintiff  
28 was able to research employment opportunities on the computer. The ALJ noted

1 that when Plaintiff maintains his sobriety, his symptoms improve. Plaintiff also  
2 appeared in a play, which indicates his anxiety was not as disabling as he alleged.  
3 The ALJ concluded the record demonstrates that Plaintiff remains quite functional  
4 despite allegations of depression and anxiety. These are specific, clear and  
5 convincing reasons to believe that Plaintiff's symptoms are not as limiting as  
6 Plaintiff describes.

7 The ALJ's conclusions regarding Plaintiff's symptom testimony is supported  
8 by substantial evidence in the record.

### 9 **Conclusion**

10 Having reviewed the record and the ALJ's findings, the Court concludes the  
11 ALJ's decision is supported by substantial evidence and is free of harmful legal  
12 error.

13 Accordingly, **IT IS HEREBY ORDERED:**

- 14 1. Plaintiff's Motion for Summary Judgment, ECF No. 14, is **DENIED**.  
15 2. Defendant's Motion for Summary Judgment, ECF No. 16, is **GRANTED**.  
16 3. The decision of the Commissioner denying benefits is **affirmed**.  
17 4. The District Court Executive is directed to enter judgment in favor of  
18 Defendant and against Plaintiff.

19 **IT IS SO ORDERED.** The District Court Executive is hereby directed to  
20 file this Order, provide copies to counsel, and close the file.

21 **DATED** this 10th day of December 2018.



25  
26

A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

27 Stanley A. Bastian  
28 United States District Judge